IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.494 OF 2004

The Board of Trustees of the Port of Mumbai .. Petitioners

vs

M/s Mohinder Singh & Company .. Respondents

Mr.E.P.Bharucha,Sr.Counsel a/w Mr.U.J.Makhija and Mr.S.Bottlewala i.b Mulla & Mulla for Plaintiff
Mr.S.U.Kamdar, a/w Mr.M.D.Sihodia i/b D.S.Retiwala for Respondents

CORAM : ANOOP V.MOHTA, J

RESERVED ON : 13th April, 2007
PRONOUNCED ON :27th April, 2007

P.C.

1. The petitioners have challenged the impugned award dated 23rd January, 2004 which was corrected on 16th April, 2004 under section 34 of the Arbitration and Conciliation Act, 1996. (for short Arbitration Act, 1996)

2. The petitioners awarded a contract to the respondents for construction of a warehouse at Haji Bunder, Sewri, Mumbai on 1st September, 1987. As there were some disputes the matters were referred to the Arbitrator and there were two awards passed by the then learned Arbitrator. As the progress was slow, the petitioners termniated the contract on 23rd August, 1991. However, in a suit No.357 of 1992 filed by the respondents challenging the

aforesaid termination of the contract a consent term was filed dated 28th May, 1992. On 11th June, 1992 the suit was disposed of accordingly. From 30th May, 1992 the work was re-commenced by the respondents. Extention was granted to complete the work. There was a third reference and therefore on 1st January, 1993 third award came to be passed. The respondents substantially completed the work by 30th July, 1992. The warehouse was inaugurated. The maintainance period was also over on 13th January, 1994. Sometime in July, 1995 the respondents vacated the site. Consequently, F.D.R. held by the petitioners were also released.

3. As there were disputes and differences arising on 15th January, 1996 the respondents invoked arbitration clause of the agreement between the parties. 4. By an order dated 21st December, 1998 this Court in Arbitration Petition No.934 of 1988 filed by the respondents, appointed a sole Arbitrator. From 15th February, 1999 to 22nd July, 2003 various meetings and hearings took place before the Arbitrator. On 23rd January, 2004 the atrbitral award was passed by the Arbitrator which was subsequently corrected on 16th April, 2004. The petitioners therefore on 12th July, 2004 filed the present Arbitration Petition.

4. As the present Arbitration Petition was dismissed for want of prosecution by an order dated

30th September, 2006 by consent of the parties on certain conditions it was restored. As directed, an amount of Rs.31,17,000/- was paid to the respondents and Rs.1,17,52,000/- was deposited and the same has been invested by the Prothonotary and Senior Master in fixed deposit receipt in a nationalised bank.

5. Admittedly, the petitioners have challenged the award in part as to claim Nos. 3 and 6 and further 18 % rate of interest in respect of claim Nos. 4,7,8 and 11 from the dates of claims made by the respondents till 15th January, 1996 and thereafter at 12 % p.a. till payment.

6. The operative part of the award is as under :

Accordingly I do make the Award as under :

(a) Re: Claim No.1: This claim is rejected.

(b) Re: Claim No.2: This claim is rejected.

(c) Re: Claim No.3:

I do award in favour of the Claimants as against the Respondents the sum of Rs.2,02,998/-(Rupees Two lacs two thousand nine hundred ninety eight only) payable by the respondents to the Claimants together with interest thereon @ 18 % p.a. from 17th Septmber 1993 till 15th January 1996 and thereafter @ 12 % p.a. till payment.

(d) Re: Claim No.4:

I do award in favour of the Claimants as against the Respondents

the sum of Rs.2,55,675.78 (Rupees two lacs fifty five thousand six hundred seventy five and seventy eight paise only) payable by the respondents to the Claimants together with interest thereon @18 %p.a. from 4th July 1995 till 15th January 1996 and thereafter @ 12 % p.a. till payment.

(e) Re: Claim No.5 This claim is rejected

(f) Re: Claim No.6:

I do award in favour of the Claimants as against the respondents the sum of Rs.30,60,678.06 (Rupees thirty lakhs sixty thousand six hundred seventy eight and six paise only) payable by the respondents to the Claimants together with interest thereon @ 18 % p.a. from 17th September, 1993 till 15th January 1996 and thereafter @ 12 % p.a. till payment.

g) Re: Claim No.7:

I do award in favour of the Claimants as against the respondents the sum of Rs.10,18,375.78 (Rupees ten lakhs eighteen thousand three hundred seventy five and seventy eight paise only) payable by the respondents to the Claimants together with interest thereon @ 18 % p.a. from 9th September 1993 till 15th January 1996 and thereafter @ 12 % p.a. till payment.

(h) Re: Claim No.8:

I do award in favour of the Claimants as against the respondents the sum of Rs.3,23,312.93 (Rupees three lachs twenty three thousand three hundred twelve and ninety three paise only) payable by the respondents to the claimants together with interest thereon @ 15% p.a. from 15th July 1994 till 15th January 1996 and thereafter @ 12 % p.a. till payment.

(i) Re: Claim No.9:

This claim is rejected as stated above.

(j) Re: Claim No.10:

This claim is not allowed as the items are included in the final bill.

(k) Re: Claim No.11:

I do award in favour of the Claimants as against the Respondents the sum of Rs.8,19,9,266 (Rupees eight lacs nineteen thousand two hundred ninety two sixty six paise only) payable by the respondents to the Claimants together with interest thereon @ 12 % pa. from 15th January 1996 till payment.

(l) Re:Costs:

Each party will bear its own costs. The observations on interest is as under : I have generaly allowed interest at the rate of 18% p.a. from the date each claim was due till 15th January 1996 when Arbitration was invoked and as from that date I have allowed a uniform rate of 12 % p.a. till payment.

7. Admittedly, the petitioner's challenge is restricted to claim Nos.3 and 6 and the rate of interest as referred above. Mr.Bharucha, learned Senior counsel for the plaintiff submitted that under the contract and as provided in clause 7.18 and 7.5 as the clause 3.5 of specifications read with rule 6.2 of MCGM Sewerage and Waste Removal Rules, the respondents were bound and liable to pay sewerage charges levied by the Municipal Corporatiion of Greater Mumbai (MCGM) regardless of the fact that during the construction work whether the respondents used the water supplied by the Municipal Corporation of Greater Mumbai or not. He however, submitted that in reference to claim no.

6 and under clauses 5,7,23,7,.24 of General Conditions of contract and clause No.1 of Schedule B and clause 2 of Preamble of to Bill of quantity, save and except cement and supply of all the material required for execution of the contract required for execution of the contract was the responsibility of the respondents. However, during the execution of the work since the respondents faced difficulty in procuring steel, the petitioners on the condition of payment of price of the steel to be supplied by the petitioners to the respondents agreed to supply and did supply the steel required for the execution of the work from time to time. He further submitted that the rate of interest as charged is exorbitant. The grant of interest from the dates of claim prior to the date of invocation of arbitration proceedings till 15th January, 1996 and thereafter at 2 % p.a. till payment is unreasonable and exorbitant. He has also relied on the decision in the case of Oil and Natural Gas Corporation Ltd vs Saw Pipes Ltd reported in (2003) 5 Supreme Court Cases 705.

8. Learned counsel appearing for the respondents however, resisted all the above submissions. He has strongly relied on M/s Mannalal Prabhudayal vs Oriental Insurance Co Ltd reported in AIR 2006 S.C. 3026 and thereby contended that grant of interest by the Arbitrator in view of section 31 (7) and 37 need not be interfered with.

9. As regards claim No.3, I am acceeding to the submissions made by the learned counsel for the petitioners that having once agreed to the MCGM Sewerage and Waste Rules (6.2) and other conditions of contract provides liability to pay such charges irrespective of supply of water by MCGM. The reasoning given by the learned Arbitrator on this count is not correct. The respondents's submissions that they had procured their own water for construction purpose and therefore, there was no question of any payment payable by them is not correct. Admittedly, the parties have agreed for those terms and conditions. Thus, the terms and conditions are binding between the parties as MCGM Rules itself provided for such contingency. Admittedly, the respondents/claimants did not pay that amount. The only foundation is that they did use their own water for construction. They did not take any water connection from the Corporation for construction purpose. The agreed terms and rules prevailing for such water and sewerage charges need to be respected by the parties themselves. Grant of claim No. 3 of Rs.2,02,998/- with interest therefore is totally wrong and beyond the provisions of MCGM Rules and agreement between the parties. Grant of such claim therefore with interest is liable to be quashed and set aside as it is beyond the agreement between the parties and therefore, unsustainable.

10. As regards claim No.6 admittedly there were consent terms which inter alia expressedly agreed that the respondents were liable to pay to the petitioners value of the steel strictly as well as enforcement steel to be supplied by the petitioners to the respondents. Admittedly, during execution of the work respondents faced difficulty in procuring steel. The petitioners agreed to supply and did supply steel required for the execution of the work from time to time. However, the learned Arbitrator after considering the terms and conditions awarded the said claim in the following terms:

> 6.1: This is a claim for re-imbursement of cost of structural steel deducted from the Claimants Bills pertaining to Item No. 1 of Section VII of Part on page 59 of B.O.Q. that item states as follows :
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> " Steel work in structural steel sections, single or compound, including cutting, straightening hoisting, weilding fabricating and erecting in position with one coat of anti-corrosive paint and 2 costs of approved oil paints etc complete."
>
> The amount claimed is Rs.30,60,678.06.

6.2. The Claimants state that this item is purely a labour rate item and does not include providing" the structural steel materials. Therefore, therse is no question of deducting any amount on account of steel supplied by the respondents. According to the claimants the respondents have deducted niall a sum of Rs.30,60,678.06 being the value of the structural steel pertaining to this item.

6.3. " Mr.Siodia points out that in the B.O.Q. items it has been clearly mentioned in each item that whether it includes "providing" or " supplying " and whereever such words are found it would mean that the Claimant is responsible for providing or supplying such materials besides carrying out the work mentioned therein. In that case, if steel of the concerned material is supplied by the respondents, that would be on the Claimant's account and he has to pay for the same. However, where such words are not found it should necessarily mean a labour item. In that case, it is for the respondents to supply the material and they have to bear the costs themselves.

6.4: There is no dispute about the quantum of steel deducted from this item and the

value of the same.

6.5: As against this, the respondents contend that all steel supplied to the Claimants will have to be paid for, by the Claimants. In that they rely on Clauses 5,7,23,7,24 and 7,24.1 of conditions of contract forming part of tender documdents. They also rely on clause No.1 of Schedule B regarding supply of material and clause 2 of Preamble to BO.Q showing the rates and prices shall be inclusive of labour, materials, maintenance etc. They also rely on certain letters from the Claimants requesting the respondents to supply steel etc. I have gone through all these items and in my view they have no relevance to the claim. The claim pertains to a particular BOQ item and the question is how do we construe the said BOQ item.

6.6.: The respondents also rely on the consent Terms dated 28th May 1992 and particularly clauses 7 and 8 thereof. Clause 7 shows that the Claimants had received as on that date a quantum of 2213.293 M.T. of re-enforcing steel and structural steel and that the respondents have recovered the costs of 1980 tonnes of steel. The claimants agree to pay for

balance of 323 mt. Clause 8 provides for preparation of the occount for steel. In fact there is no dispute about the steel supplied and steel recovered. Mr.Siodia points out that up to 57th running bill dated 15th June 1993, the respondents have deducted for 2170.677 M.T. This tallies with the steel supplied.

6.7: The question is one of construction of BOQ item referred to above. Under that item there is no question of recovery any steel. That item is only for labour. After the supply of steel and accounting for the sanme there is no question of their again deducting [for steel under the BOQ item in question.

6.8: The other defence is one of limitation which as mentioned earlier cannot stand scrutiny.

6.9. Hence, I allow this claim and the Claimant is entitled to recovery the said amount together with interest there on at the rate of 18 % p.a. from 15th January, 1994.

11. The submissions of the counsel apearing for the respondents is as reflected in para 20,21 and

22 of thereply as reproduced is correct.

12. The interpretation of the terms and conditions of the contract in the facts and circumstances of the case as expressed by the learned Arbitrator cannot be said to be perverse or contrary to law. The view as taken is within the frame work of the terms and conditions. I am not inclined to interfere with the same. Petitioner's submissions in respect of claim No. 6 is therefore, rejected.

13. In so far as interest part is concerned, I also find that the rate of interest as awarded at the rate of 18 % p.a. is on higher side. Considering the fact that the dispute is pending since long, grant of interest at the rate of 12 % wold be fair and reasonable for all the three stages i.e pre-reference period, pendente lite and post award period as accepted by the apex court in M/s Mannalal Prabhudayal supra.

14. The grant of interest from the date of claim is also within the scope and power of section 31 (7) and 37 of the Act. There is no perversity or illegality in granting such a claim. The Arbitrator has jurisdiction and power to grant such interest at all the three stages. In M/s Mannalal Prabhudayal supra the insurance coverage was fixed. The grant of rate of interest on that particular amount is therefore cannot be compared with

interest rate awarded by the Arbitrator in the present case from the date of claim. However, the petitioners have challenged the present award in part in respect of claim Nos. 3 and 6 and paid payments towards other claims. I am not inclined to accede to the submissions made by the learned counsel for the respondents that the rate of interest as claimed and awarded need to be maintained.

15. The basic claim of the respondents is on the amount due which was ascertained by the Arbitrator. Basically in respect of claim No. 4 as the said FDR was wrongly withheld therefore, interest as awarded on claim No.4 is maintained at the rate of 9 % p.a. from 14th July, 1999 interest at 18 % as claimed.

In view of the Judgment of the Supreme Court in Krishna Bhagya Jilha Nigam Ltd vs Hariom Realty, 2007 AIR S.C.W.527, whereby after hearing both the parties in arbitration proceedings of construction contract the Supreme Court has restricted the interest rate at 9 % for all three stages which according to me is applicablein the facts and circumstances of the present case also.

16. So far as claim No.6 is concerned, claim was assessed by the Arbitrator. Therefore, the grant of interest on the said amount also cannot be

faulted with except the rate of interest is restricted at 9 % p.a. from 15th January, 1994 instead of 18%.

17. The interest on claim no.7 about reimbursement of amount is wrongfully recovered at the panel rate also has remained unchallenged. Therate of interest on the said amount is restricted at the rate of 9 % instead of 18 % from 9th September, 1992.

18. Interest on claim No. 8 is based on deductions from the claimant's FDR. The rate of interest therefore, from 11th July, 1994 and grant of interest from 15th July, 1994 is restricted at the 9 % interest instead of 18 % p.a.

19. The claim of interest on claim no. 9 is for re-imbursement for amount of costs on account of idling of machinery and additional coverage.

20. Claim No.11 relates to the final bill which was not settled. The amount so ascertained by this award is entitled to 9 % interest on the amount so ascertained from each claim made as particularised in the above order. However, the rate of interest is restricted to 9 % p.a. from the date of each claim due till 15th Janaury, 1996. The rate of interest is also restricted from 15th January, 1996 at the rate fo 9 % p.a. till payment.

In the result, the award is modified to the above extent.

22. The petitioners themselves have restricted their challenge to the above in part. The petitioners or parties having themselves restricted their challenge to the Arbitral claim has no objection and therefore, even in such circumstances, there is no option but to modify the award after hearing both the parties. There is no bar under the Arbitration Act, 1996 to modify such an award in the present case when the parties themselves submitted to the modification and has restricted challenges has been made. I am of the view that this Court can modify the award as it is within the frame work of law and as a settled law.

23. The rate of interest at all stages as referred to above on all the claims are restricted at the rate of 9 % p.a. from the respective date instead of interest at 18 % p.a. as referred above.

The petitioner's claim no.3 is rejected in toto.

The petitioner's claim no.6 is maintained.

Petition is partly allowed. The award is modified to the above extent.

No costs.

(Anoop V.Mohta, J)